

Buffalo Environmental Law Journal

Volume 11 | Number 1

Article 3

10-1-2003

Ecological Effects Know No Boundaries: Little Remedy for Native American Tribes Pursuing Transboundary Pollution under International Law

Peter D. Lepsch

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/belj>



Part of the [Environmental Law Commons](#), [Indian and Aboriginal Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Peter D. Lepsch, *Ecological Effects Know No Boundaries: Little Remedy for Native American Tribes Pursuing Transboundary Pollution under International Law*, 11 Buff. Envtl. L.J. 61 (2003).

Available at: <https://digitalcommons.law.buffalo.edu/belj/vol11/iss1/3>

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Environmental Law Journal by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

**Ecological Effects Know No Boundaries:
Little Remedy for Native American Tribes Pursuing
Transboundary Pollution under International Law**

Peter D. Lepsch*

Table of Contents

I. INTRODUCTION.....	62
II. CURRENT ENVIRONMENTAL DAMAGES CONFRONTING TRIBES AT BORDERS	66
A. Historic legal status of tribes in the United States, Canada, and Mexico	
1. United States.....	70
2. Canada.....	72
3. Mexico.....	73
III. OVERVIEW OF INTERNATIONAL ENVIRONMENT LAW...	75
IV. TRIBAL REMEDY FOR ENVIRONMENTAL IMPACTS ACROSS BORDERS	78
A. Adjudication for Violations of International Environmental Law in United States Courts.....	80
B. Adjudication of Claims for Violations of International Environmental Law in International Forums.....	83
C. Tribal Options to Remedy International Environmental Claims.....	85
V. CONCLUSION.....	87

* M.S., Justice Law & Society, The American University; J.D., New England School of Law. Mr. Lepsch is an attorney in private practice and Of Counsel to the Law Offices of Douglas J. Luckerman representing American Indian tribes on issues of sovereignty, self-determination, and tribal-state relations. The views expressed in this article are not necessarily those of the firms or its clients.

I. INTRODUCTION

Native American tribes straddling the international boundaries with Canada¹ and Mexico—not unlike their counterparts exclusively within the boundaries of the United States²—confront serious threats to the environment and, in turn, their culture. These threats to tribes' environment and culture are complicated given the unique, historically evolved legal relationship between each tribe, the United States, and a tribe's respective state.³ At times the U.S. Congress has provided for tribes to be treated as states under environmental statutes, thereby enabling tribes to effectively use federal law to assert control over environmental conditions within Indian country;⁴ but at other times, Congress has provided no authority to tribes as governmental entities to use federal law to initiate clean-up initiatives or control the transportation of potentially hazardous waste within

¹ The United States-Canada border spans 3,500 miles. See Leah Castella, Note, *The United States Border: A Barrier to Cultural Survival*, 5 TEX. F. ON C. L. & C. R. 191, 194-96 (2000).

² The United States-Mexico border runs approximately 2,000 miles. *Id.* at 194.

³ See *Yakima County v. Confederated Tribes and Bands of the Yakima Nation*, 502 U.S. 251 (1992); *Oklahoma Tax Comm'n v. Citizens Band of Potawatomi Indians*, 498 U.S. 505 (1991) (noting and discussing the historic evolution of authority of tribes and states and noting that state authority over tribes is to the exclusion of the states without express grant by Congress). See also Peter D. Lepsch, *A Wolf in Sheep's Clothing: Is New York State's Move to Cleanup the Akwesasne Reservation an Endeavor to Assert Authority Over Indian Tribes?*, 8 ALB. L. ENVT'L OUTLOOK J. 65 (2002).

⁴ See, e.g., Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1377 (1977); Clean Air Act, 42 U.S.C. §§ 7401-7642 (1990) (contain provisions for the treatment of tribes as states). See generally *Montana v. EPA*, 137 F.3d 1135 (9th Cir. 1998) (discussing Congress' authority to provide for the treatment of tribes as states and upholding such regulations for the treatment of tribes as states).

Indian country.⁵ This complexity is further exacerbated when border tribes are involved.⁶ Border tribes face the weighty challenges and implications of international law, foreign policy, and the historic relations of two nation-states with a single tribe.⁷ As one commentator describes, “the presence of the U.S.-Canada [Mexico] border dilutes the sovereignty claims of tribal nations whose lands straddle the border, thereby decreasing the ability of those communities to have an effective say in their own future.”⁸

Given this context and the fact that border tribes face nearly a half-century of festering environmental problems, tribes must seek ways to garner support and legal remedy for their precarious position.⁹ Tribes, like a growing consensus in the international community, understand that ecological effects know no boundaries. Sometimes these ecological catastrophes cross international boundaries and tribal communities must confront this danger head-on in the midst of legal uncertainty. Border tribes today stand in an unappealing position: on one hand, holding a

⁵ See *Backcountry Against Dumps v. EPA*, 100 F.3d 147 (D.C. Cir. 1996) (RCRA provides no tribes as states provisions). Tribes have again and again, notwithstanding potential impact on the analysis of an international boundary, struggled with the problem of controlling the disposal and transportation of solid waste within Indian Country). See, e.g., *Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty.*, 991 F.2d 458 (8th Cir. 1993) (tribal ordinance monitoring shipment of nuclear materials preempted by federal statute).

⁶ For instance, border tribes' lands are both in either Canada or Mexico and the United States. There are often three competing sovereigns attempting to govern each tribe when the state or province assert authority over tribes. See Castella, *supra* note 2, at 192.

⁷ See generally *id.* (providing an examination of tribal relationships with Mexico, Canada and the United States translating into differing day-to-day problems that pose a threat to the cultural survival of transborder tribes).

⁸ *Id.* at 199-200.

⁹ It should be noted that definitions of terms of art including: “environment”, “pollution”, “environmental damages”, and “damage to natural resources” might have specific definitions given the statute or international convention. Generally, this Article will use these terms in a normative manner unless otherwise indicated.

relationship individually with two sovereigns, while on the other—due in large part to their unique geographical location—possessing little standing in the international community.¹⁰ Moreover, the artificial nature of an “imaginary line” dividing peoples is at the heart of this examination.¹¹

This Article provides an overview of the legal issues facing tribes living on international borders and tribes’ continuing confrontation of potential ecological catastrophes arising from downwind and down-stream cross-border public and private polluters. The Article will briefly consider the historic legal status of tribes in the United States, Canada, and Mexico. The primary focus however, will be on the current and frustrating predicament facing border tribes as they struggle to seek legal remedy to growing environmental concerns.

The unique legal and political pressures of tribes on international borders in the context of the environmental, self-determination, and sovereignty issues and related current protections of tribes vis-à-vis entitlements provided by each country, form a basis for the difficulty tribes find themselves when asserting sovereign political identity in the world community and more significantly in courts. In addition, an exploration of the status and protections available in international environmental law will be considered. Specifically, a short review of the legal landscape will provide a clearer picture of the legal status of tribal border communities and tribal ability to protect their environments at international boundaries and why customary international environmental law has yet to become an effective tool in tribal communities’ ability to protect their environment.¹² The growing

¹⁰ See *infra* Section IV.

¹¹ See Castella, *supra* note 2, at 191-92, 196. Treaty of Paris (creating the border between the United States and Canada) and Treaty of Guadalupe Hidalgo and the Gadsden Purchase creating the Mexican-United States border.

¹² This is not to say that Canada, Mexico or the United States do not and have not made efforts and strides to include tribes in the facilitation and participation in environmental planning and management of the environment including cleanup and hazardous transportation contingencies. For example,

international concern for protection of indigenous populations offers an increased recognition that international law provides developing mechanisms that potentially protect the polity, culture, and the environment of native communities).

It is hoped that a broad overview of the status of boundary tribes confronting the legal pitfalls of two nations and that of international law will further an understanding of the precarious nature of tribes straddling international boundaries. Finally, the legal challenges confronted from so many directions contribute to the erosion of culture and political integrity of these at risk societies. In the end, tribes must assert their political autonomy in order to achieve native people a place in the world community. In context, as tribes confront serious threats to cultural and political survival. This overview will thus provide a short-list of the mechanisms, not only a means to navigate the minefield of national and international law, but also a method to sustain or perhaps gain levels of self-determination that have not been experienced in several generations.

United States Environmental Protection Agency officials have outlined plans for Canadian First Nations and U.S. Tribes to be included in consultations when "setting priorities for action[s]." *See* Borderline News, Oct. 2001, at 4. The focus of this Article is to assert that border tribes have additional sources to seek remedy for environmental violation rather than rely upon competing sovereign interests providing the support and enforcement of potentially threatening pollution to tribal health and safety. *See also* Environmental Protection Agency, U.S.-Mexico Border Environmental Program: Border 2012, *available at* <http://www.epa.gov/r6border/index.htm> (last modified March 24, 2004) (noting that the United States Environmental Protection Agency has included the twenty-six U.S. tribes on the Mexican border in negotiations on notification and evaluations policies related to Transboundary Environmental Impact Assessments).

II. CURRENT ENVIRONMENTAL DAMAGES¹³

CONFRONTING TRIBES AT BORDERS

Over forty indigenous tribes¹⁴ share a border with the United States¹⁵ and either Canada or Mexico.¹⁶ For many tribal communities on the international boundaries, threats to their ecological integrity are minimal worries in recent years.¹⁷

¹³ It should be noted that for purposes of this Article that the focus is exclusively upon tribes and not individuals. Moreover, the phrases "environmental damage" and "damage to an individual" should also be distinguished and here the focus of this Article shall consider only environmental damage.

¹⁴ Border tribes include St. Regis Mohawk or Akwasasne (New York on Ontario and Quebec), Blackfeet (Alberta and Montana), Tohono O'odham (Arizona and Mexico), Yaqui (Arizona and Mexico), Kickapoo (Texas and Mexico), Red Lake Band of Chippewa (Minnesota and Canada), Salt River Indian Community (Arizona and Mexico), Cocopah (Texas and Mexico), Isleta Del Sur (Texas and Mexico), Aroostook Band of Micmac (Maine and New Brunswick), Houlton Band Maliseet (Maine and New Brunswick). See Environmental Protection Agency, U.S.-Mexico Border Environmental Program: Background, available at <http://www.epa.gov/usmexicoborder/background.htm> (last visited Oct. 6, 2003) (listing twenty-six (26) U.S. tribes in the Mexican border region).

¹⁵ The primary concern of this Article is the boundary of the contiguous forty-eight United States, although Alaska tribal villages abut Russia as well as the Canadian border.

¹⁶ See Environmental Protection Agency, U.S.-Mexico Border Environmental Program: Border 2012, available at <http://www.epa.gov/r6border/index.htm> (last modified March 24, 2004) (noting over 40 indigenous groups both in the United States and Mexico on the Mexican border alone).

¹⁷ Numerous tribes straddling the Nation's international boundaries confront a range of issues including basic passage across the international border free of INS and customs oversight and drug and human trafficking. Here are several examples of tribes and the border issue recently faced: (1) St. Regis Mohawk (New York, Ontario, and Quebec), Chinese immigrant smuggled through Mohawk reservation. See David Meimer, *Chinese Immigrants Smuggled Through Mohawk Reservation*, INDIAN COUNTRY TODAY, Jan. 11, 1999, at A1. (2) Blackfeet (Alberta and Montana), recent problems with border crossing disputes after tribal requests for an active only border crossing accusing customs official alleged smuggling contraband (tobacco, eagle feathers). Tribe complains

However, part-in-parcel of the combined troubles tribes face, ecological concerns posed by pollution and other contaminants threaten tribal health and cultural integrity.¹⁸

Tribes on the borders of the United States and its neighbors are in a precarious position when it comes to transborder pollution. For instance, tribes wishing to seek a remedy for cleanup of hazardous waste have several legal remedies at their disposal if the contamination was generated within the United States and contaminated a tribe within the United States.¹⁹ However, tribes

that it cannot attend religious and cultural ceremonies, as the border requires them to live a world apart. See Jamie Monastyraki, *Invisible Border Creates Hardship for Blackfeet*, INDIAN COUNTRY TODAY, Mar. 22, 2000, at C5. (3) Tohono O'odham (Arizona and Mexico), drug issues and citizenship designation. (4) Yaqui (Arizona and Mexico), similar cultural issue as Blackfeet for border passage and the issuance of passports to ease the tension for members to attend ceremonies across the international border. See Brenda Norrell, *Taqui Oppose Enrollment*, INDIAN COUNTRY TODAY, June 29, 1998, at B1. (5) Kickapoo (Texas and Mexico), with the Tohono O'odham pressing for congressional legislation to extend U.S. citizenship, residency and free passage across borders to tribal members. See Monastyraki, at C5. (6) Red Lake Band of Chippewa (Minnesota and Canada) (crossing issues including need to get to part of reservation by land requires the leaving of the United States to then reenter the United States). See Paul Richardson, *Illegal Alien or Sovereign First American*, INDIAN COUNTRY TODAY, Feb. 9, 1998, at A3.

¹⁸ See generally Castella, *supra* note 2, at 191-93 (making a point that the problems faced by border tribes threaten the cultural sustainability of tribal peoples).

¹⁹ In such instances federal and state environmental statutes provide for removal and remediation and several statutes enable tribes to act as if they were states. See, e.g., Clean Air Act, 42 U.S.C. §§ 7401-7642 (1990) (including provisions to treat tribes as states); Federal Water Pollution Control Act, 33 U.S.C. §§ 1259-1377 (1977) (amended to include tribes to be treated as states provisions); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9657 (1980) (includes provisions for tribal treatment as states, but specifically excludes tribes from federal funding assistance for Superfund cleanup); Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 *et seq.* (1976) (includes no tribes as states provisions for hazardous waste cleanup).

acting as political entities²⁰ that seek cleanup of hazardous waste pollution—which naturally found its way by river, groundwater, or air across an international boundary—have few if any legal remedies.²¹

Each border tribe retains a relationship not only with the United States but also a continuing relationship with either Canada or Mexico and may have a limited legal relationship²² with a state or province in which the tribal lands are contained.²³ Fundamentally, tribes at the international borders confront basic questions of where the border is and where one nation begins and ends. For tribes, borders are imposed physical barriers—often imaginary given the nature of a tribe's aboriginal territory. Thus, the answer to where this legal imaginary border lies has great implications on a tribe's legal jurisdiction and in turn when tribes might have the authority to seek remedy for violations of international law. For instance, it is unclear whether each tribe, under principles of sovereignty, must be dealt with individually in terms of notification, consultation, and evaluation—although it might be argued, that tribes are included in the process at the federal level in

²⁰ See generally *United States v. Wheeler*, 435 U.S. 313, 331 (1978) (holding it is a long-held principle that tribes are "distinct political communities").

²¹ Prosecution of violations of environmental statutes may be undertaken by the United States, Canadian, or Mexican governments with or without tribal cooperation, support, or interest. And such prosecution might seek international forums to adjudicate or redress environmental concerns. Without state cooperation, tribes that live along borders may have no legal remedy and certainly no standing to prosecute across international borders. See *infra* Section IV.

²² For example, the United States' relationship with Indians is historically to the exclusion of the states unless Congress expressly grants authority to states over tribes. See *Williams v. Lee*, 358 U.S. 217 (1959).

²³ For example, in the United States the limited relationship with each state government is dictated to the extent the United States Congress has granted authority to the state of specific jurisdictional and other legal entitlements over tribes. See generally WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* (3d ed. 1998) (providing an overview of the relationship of the United States to tribes and state governments).

the United States and in Canada or Mexico.²⁴ In some instances treaties provide for tribes on international boundaries²⁵ but often without the specificity of naming specific tribes to provide the elusive standing requirement necessary to hold right under the treaties and thus ensuring that tribal authority over issues like environmental concerns are understood and enforceable.²⁶

With increased worldwide attention in recent years upon indigenous peoples, an emerging dialogue has resulted in numerous international pronouncements on the rights of aboriginal peoples including indigenous peoples' right to self-determination and participation in the international community.²⁷ It is therefore no stretch to consider that border tribes in North America have found new vigor to confront and preserve their culture at times when environmental impacts from the deleterious effects of hazardous wastes and other pollution permeating across international boundaries.

Prior to discussing the manner in which tribes today might seek adjudication or remedy for transboundary pollution concerns it is useful to first examine the nature of the relationship between the tribes both with the United States as well as with the other

²⁴ For example, since tribes are viewed as "domestic dependent nations" under the doctrine articulated in *Worcester v. Georgia* and its progeny, tribal interests in cross-boundary sovereignty issues are divested or diminished because of dependent status. See *Oliphant v. United States*, 435 US 191 (1978) (noting that some aspects of tribal sovereignty are diminished due to dependent status).

²⁵ See, e.g., Treaty of Peace and Amity, Dec. 24, 1814, U.S.-Gr. Brit., 8 Stat. 218; Treaty of Amity, Commerce and Navigation, Nov. 19, 1794, U.S.-Gr. Brit., 8 Stat. 116.

²⁶ i.e. administrative jurisdiction over environmental regulation. See generally *Basel Convention on Control of Transboundary Movements of Hazardous Waste and Their Disposal*, Mar. 22, 1989, 28 I.L.M. 657 (1989) (providing no provisions for indigenous peoples); *Agreement on Air Quality*, Mar. 13, 1991, U.S.-Can., 30 I.L.M. 676 (1991) (providing consultation provisions); *International Boundary Water Treaty Act*, Jan. 11, 1909, U.S.-Gr. Brit., arts. 8-9, 36 Stat. 2448, 2452 (providing no provisions).

²⁷ See *infra* Section III.

70 BUFFALO ENVIRONMENTAL LAW JOURNAL [Vol. 11
nation with which a tribe shares its border. In doing so, a better understanding of the complex nature of the relationship that tribes have with the competing sovereign interests and a better understanding will be developed as to the role and ability of tribes as indigenous peoples to promote their rights and protect the environment.

A. Historic Legal Status of Tribes in the United States, Canada, and Mexico

1. United States

Like Canada and Mexico tribes in the United States are no longer international sovereigns with exclusive jurisdiction over their lands.²⁸ Tribes in the United States are “domestic dependant nations” with limited sovereign powers,²⁹ however their relationship with the United States government most importantly remains political, not one of minority or ethnic origin.³⁰ The Supreme Court took up American Indian tribes’ legal status in three seminal cases known as the *Marshall Trilogy*,³¹ which established the broad principles for American Indian law and the principles that remain generally true to this day:

²⁸ See generally *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) (it is interesting to note that *Cherokee Nation*’s outcome turned on whether the Cherokee Nation was a “foreign state” within Article III, § 2 of the United States Constitution). The Court has yet address whether tribes are foreign states in any other context.

²⁹ *Id.* at 17

³⁰ See generally *Morton v. Mancari*, 417 U.S. 535 (1974) (affirming the political nature of the federal tribal government to government relationship).

³¹ Marshall’s Indian Law Trilogy includes: *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation*, 30 U.S. (5. Pet.) 1; *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

"Congress exercises plenary power over Indian affairs; that Indian tribes retain, sovereign, though diminished inherent powers over their internal affairs and reservation territory; and that the United States possesses a trust responsibility toward Indian tribes"³²

Following Marshall's decisions the federal government would ratify some 250 treaties with tribes until 1871 when Congress attached a rider to an appropriations bill which barred the United States from negotiating treaties with tribes.³³ The termination of treaty making with Indian tribes also terminated the power to make executive agreements with the Indians.³⁴ What replaced these functions in a practical sense was statutory law and legislative oversight.³⁵ However, despite the formal bar to treaty making, Indian agreements between the United States and tribes continued.³⁶ Today the relationship of each recognized tribe is a complex examination of treaty rights, federal statutory authorization granted to states by the federal government, and a continuing trust responsibility the United States owes to tribes.

³² DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 74 (4th ed. 1998).

³³ See FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY Appx. B (1994) (providing a full annotated listing of all federal-tribal treaties).

³⁴ See 25 U.S.C. § 71 (1989). However, case law indicates that Executive Orders even after 1871 establishing tribal reservations allowed the executive to circumvent the 1871 bar on negotiations and treaty making. See, e.g., *Antoine v. Washington*, 420 U.S. 194 (1975), for an excellent example of an Executive Order implementing a reservation.

³⁵ See U.S. DEPARTMENT OF INTERIOR, FEDERAL INDIAN LAW 24-25 (1958).

³⁶ Between 1872 and 1911, seventy-three agreements were negotiated with specially appointed Indian commissioners or no known commissioner. In many cases these agreements were ratified or confirmed by Congress sometimes considerably later after negotiations. Some agreements were ratified by special acts of Congress while for others the ratification was included in Indian affairs appropriation acts. See PRUCHA, *supra* note 34, at 313-14, 506-16 (Appendix C lists the 73 "treaty substitutes" entered into).

2. Canada

Beginning with Great Britain's Royal Proclamation of 1763,³⁷ First Nations³⁸ peoples of Canada found legal status in treaty-based rights that were subsequently reaffirmed over the next century and a half. Like the United States the legal and political relationship of native peoples with the Canadian national government was exclusive of the provincial subdivisions and individual citizens.³⁹ And like United States policy toward Indians, the pendulum in Canadian policy also historically swung between periods of relative tolerance for native peoples—manifested by a federal policy of self-determination—to extreme intolerance—often seen in federal legislation imposing assimilationist programs upon all things tribal.⁴⁰ And like the United States, Great Britain in the nineteenth century found that the doctrine of discovery provided the foundational principle for the Crown's right to confiscate land and extinguish indigenous title.⁴¹

³⁷ See 1 FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES AND THE AMERICAN INDIANS* 24 (1984).

³⁸ Tribes in the United States are referred to as "First Nations" in Canada.

³⁹ For instance, in 1867 the creation of a federal Canada implemented protections of Native Americans from settlers by the federal Canadian government. See GETCHES ET AL., *supra* note 33, at 978. The British North American Act of 1867 placed the Canadian federal government in charge of Indian affairs. See *id.* at 980 n.1. Cf. 25 U.S.C. § 177 (1988) (subjecting all interaction with tribes under federal control including the purchase and transfer of lands by states and individuals).

⁴⁰ For instance, one of the first policies promulgated by Canada, the Indian Act of 1876, pushed forward an assimilationist policy, requiring land-use determinations and allocations and the management of tribal resources and allowed the provinces to abrogate treaties. See GETCHES ET AL., *supra* note 33 at 980. See also Civilization of Indian Tribes Act, 1857, 19 & 20 Vict., ch. 26 (Can.) (providing for the removal of aboriginal peoples from their native Canadian lands to allow for white settlements).

⁴¹ See Alexandra Kersey, *The Naunavut Agreement: A Model for Preserving Indigenous Rights*, 11 ARIZ. J. INT'L & COMP. L 429, 431 (1994).

In recent years, Canadian courts have held that tribes accept the principle that tribes' hold aboriginal title,⁴² which has led to over a decade of initiating a comprehensive land claims policy for treaty negotiations across Canada between the Canadian government and tribal governments. Today tribes deal with the federal Canadian government except where federal policy or law provides provincial authority.⁴³ The existence of a fiduciary obligation to aboriginal peoples in Canada has historical roots that include the Treaty of Utrecht (1713), the Capitulation of Montreal (1760), the Royal Proclamation of 1763, and section 91(24) of the Constitution Act, 1867 and requires the government of Canada to protect the rights and well-being of Aboriginal peoples.⁴⁴

3. Mexico

For hundreds of years the Spanish influence in present day Mexico attempted to shape and remodel the non-Christian, non-White native inhabitants in accordance with the Spanish perceptions of civilized cultural and in accordance with the directives of the Catholic church.⁴⁵ Eventually under the colonial Mexican government, native peoples of lower North American, like their neighbors in the United States and Canada, would be relegated to marginal political status and influence in Mexico.⁴⁶

In 1853, the United States-Mexican border was made permanent with the Gadsden Purchase⁴⁷ and its provisions

⁴² See *Calder v. Attorney Gen. of British Columbia* [1973] S.C.R. 313.

⁴³ See Kersey, *supra* note 42, at 430.

⁴⁴ See 1 S. JAMES ANAYA ET AL., CANADA'S FIDUCIARY OBLIGATION TO ABORIGINAL PEOPLES IN THE CONTEXT OF ACCESSION TO SOVEREIGNTY BY QUEBEC 1 (1995).

⁴⁵ See Lola Clayton Rainey, *Monopolistic Land Tenure and Free Trade in Mexico: Resurrecting the Ghost of Porfirian Economics*, 23 AM. INDIAN L. REV. 217, 220 (1999) (providing a substantial overview of Spanish and subsequently Mexican political and economic co-option of Indian peoples and cultural affairs).

⁴⁶ See *id.* at 222.

⁴⁷ See The Treaty of La Mesilla, Dec.30, 1853, U.S.-Mex., 10 Stat. 1031.

reaffirmed earlier treaty provisions protecting the rights of Mexican citizens including tribes now within the United States or residing along its newly formed border.⁴⁸ Tribes along the border, under the treaty, were allowed to continue religious practices and maintain their lands and culture. And for the most part, native peoples in rural Mexico remained isolated practicing traditional culture. For much of the next one-hundred years, it was only when tribal peoples of Mexico collided with the economic goals of the Mexican government and private entrepreneurs that native peoples no longer remained isolated. For instance, during a thirty-year period beginning at the turn of the twentieth century, advancement of agricultural and mining prospects in Mexico's Northern regions brought considerable confrontation with local tribal people.⁴⁹ Military troops were sent by the Mexican government, to these Northern regions to find and implement a "final solution" to the Indian problem. The Mexican government would eventually carry out a policy applying the combination of pacification, starvation, deportation (to regions in the south) and extermination through massacre upon the native peoples of Mexico.⁵⁰

The remaining isolated pockets of native people have only within the past forty years found and advocated for their political and cultural autonomy in Mexico. For example, the Indian movement of the 1960s and 1970s in the United States was paralleled in Mexico to increase tribal autonomy and self-determination throughout Mexico.⁵¹ Today Mexican native

⁴⁸ See Castella, *supra* note 2, at 204.

⁴⁹ See Rainey, *supra* note 46, at 266-67

⁵⁰ See *id.* at 267.

⁵¹ See First National Congress of Indigenous Peoples, Patzcuaro, Michoacan, Mexico (Oct. 7-10, 1975) (the conference's purpose was to formulate statements concerning indigenous peoples' rights to self-determination noting that self-determination means "the conscious integration into the national community and a complete exercise of democratic rights that we are privy to under the order of the Constitution of the Republic—[and] it is not a sign of privilege or isolation."), *cited in* Resultado del Primer Congreso Nacional de Pueblos Indigenas: *Accion Indigenista*, no. 268, octubre de 1975" [author's translation].

communities are gathered in several political and or cultural communities, including distinct Indian communities,⁵² reserves and isolated communities.

III. OVERVIEW OF INTERNATIONAL ENVIRONMENT LAW

Unlike domestic law, "international law does not often express its doctrinal conclusions in the form of authoritative judicial decisions or legislative acts, much less characteristically embody rights and duties in constitutional instruments. International law is generally embodied either in agreements, which are adhered to formally by states in accordance with constitutional procedures, or in practice, by a sense of obligation and thereby acquires over time the status of customary international law."⁵³ Only recently⁵⁴ has the world community come to realize and recognize the evolution and "significance of international environmental problems and to view them as appropriate subjects of international law."⁵⁵

Thus, international environmental law has grown in the past three decades and along with it the mechanisms to hold violators accountable across boundaries. Once thought the exclusive purview of state actors acting alone to exploit resources, the growing international consensus contemplates not only principles of state exploitation of natural resources to the benefit of the state,

⁵² See Rainey, *supra* note 46, at 277 (explaining distinct Indian communities in the State of Oaxaca, Mexico).

⁵³ See ANAYA ET AL., *supra* note 45, at 2

⁵⁴ Here the author places recent events of the last five decades as illustrative of the world community's growing concern for the environment as a class of issues that should be of multinational concern. See *infra* note 72, and accompanying text.

⁵⁵ Bilder, *The Settlement of Disputes in the Field of the International Law of the Environment*, 144 REC. DES COURS 139 (1975), reprinted in BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 1070 (3rd 2000) (noting that only with events like the chemical spill in the Rhine and the Cuyahoga River fire in Ohio did the legal community turn its head to find interest in the field of environmental law).

but also a recognition that states must assure other states that the effects of resource exploitation are not felt within the borders of another state.⁵⁶ Today, most international environmental law is treaty law and in many cases this law is multilateral.⁵⁷ However, like other areas in the field of international law,⁵⁸ including human rights law, there is growing consensus in the use customary international environmental law although the scope is limited.

Much of the recognition of international environmental law as a growing field of importance has grown out of the role of the United Nations and the work of non-governmental organizations.⁵⁹ The growing dedication by the international community to environmental issues in the last four decades resulted in conferences that have quickly concluded an emergent belief in the importance of environmental principles shared by the global community. For instance, in 1972, the Stockholm Conference and the Declaration on the Human Environment ushered in the era of contemporary international environmental law and recognized that environmental problems were a unique class of international problems.⁶⁰

In the three decades since, increasingly, the global nature of commerce and consumption has brought to the surface the transboundary nature of pollution. However, transboundary pollution like other pollution is often incident or locality specific and therefore does not always warrant the sustained attention of the

⁵⁶ See RESTATEMENT (THIRD) ON THE LAW OF FOREIGN RELATIONS § 601 (1987).

⁵⁷ See BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 1069 (3rd 2000).

⁵⁸ Another area, and most prominent area, of developing customary international law is human right law. See generally ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT (1994) (providing a discussion on the trend of human rights law developed as customary international law).

⁵⁹ See CARTER, *supra* note 58, at 1069.

⁶⁰ See Bilder, *supra* note 56, at 1081.

international community.⁶¹ The reality of the isolation and distance of the pollution problems rings true in the context of tribes that straddle international borders. For instance, larger problems that are transboundary and effect several nations are pollution problems that affect large areas of land get significant attention.⁶²

By 1992 the world community reaffirmed its commitment to environmental concerns were of great international concern and met at the United Nations Conference on Environment and Development, what came to be known as the Rio Conference.⁶³ The resulting document solidified the world community's continued commitment to the global nature of preserving and sustaining the Earth's environment through entry in to several bilateral and multilateral agreements.⁶⁴ Provisions for the first time addressed the growing concern for transboundary pollution.⁶⁵ In the end most observers agreed that Rio reaffirmed and restated Stockholm Conference's original principles, calling for the continued development of new international law to deal with the emerging environmental problems of an increasingly globalized world.⁶⁶

⁶¹ See ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 1183 (2d ed. 1998).

⁶² For instance, a classic example of large-scale transboundary pollution is the Rhine River spill, November 1986, near Basel, Switzerland. The chemical plant fire released eleven metric tons of mercury compounds and 100 tons of agricultural chemicals into the Rhine River affecting the health and safety of 900 kilometers downstream all the way to the North Sea. *See id.* at 1184. To provide context, the Rhine flows through six nations and no one government has responsibility for ensuring the environmental safety of the entire system. *See id.* at 1191.

⁶³ *See id.* at 1207.

⁶⁴ *See* Dunhoff, *From Green to Global: Toward the Transformation of International Environmental Law*, 19 HARV. ENVTL. L. REV. 241 (1995) reprinted in CARTER, *supra* note 58, at 1089.

⁶⁵ *See id.*

⁶⁶ *See id.* at 1090-91.

Downwind and downstream native peoples have little power short of persuasion, the continued invocation of the doctrine of comity⁶⁷, or the pendulum like goodwill of their respective geographically coextensive sovereign by which to protect their members from transboundary pollution. Given this context, as a general proposition, upwind and upstream international states have little incentive to use political capital to regulate near border polluters whose waste streams would have little or no cognizable effect on its own citizens.⁶⁸ Therefore, sustained and increased pressure must be made by nongovernmental organizations and citizens advocating an increased role by the United States, Canadian, Mexican governments, and tribal governments for increased regulation and intervention by national government along border regions.⁶⁹

More fundamentally, border tribes confront serious threats to cultural and political survival due to threats posed by environmental pollution. It is not enough for the United States, Canada and Mexico to merely identify the precarious position tribes find themselves. It is also insufficient for the international community to create non-binding international instruments identifying the global rights held by indigenous peoples without creating legal mechanisms to allow native people to pursue adjudicatory remedy. Tribes living on the borders not only must

⁶⁷ The voluntary respect for one state for the interests of the sister state.

⁶⁸ States and provinces also have little incentive to pursue transboundary pollution issues on behalf of tribes unless a federal law mandates such action or that state or provinces finds it to its advantage either because its citizens, community, or industry is directly affected or it finds that doing so on behalf of tribes provides an advantage to assert further authority over tribal governmental entities. See Lepsch, *supra* note 3, (arguing that federal authority over tribes remains the most effective and essential protection of tribal political entities from state or by analogy provincial governments assertion of authority).

⁶⁹ See PLATER ET AL., *supra* note 62, at 310.

creatively seek means to navigate the minefield of domestic and international law, but also to implement constructs to sustain or perhaps gain levels of self-determination that have not been experienced in several generations. Tribes straddling international boundaries must contemplate a range of legal and domestic mechanisms to seek remedy for threats to a tribes cultural and environment.

As described above tribes divided by the “imaginary lines” separating the United States from Canada and Mexico place tribes with sometimes less protection than that of tribes located wholly within the territorial integrity of a respected nation. There is little question that indigenous nations acting as political entities have few forums to assert claims under international law despite retained sovereignty.⁷⁰ To this point, historically, tribal sovereigns have simply not been players at international law.⁷¹ International courts have been skeptical of tribal governmental entities’ claims under international law treating tribes as though they are invisible.⁷²

⁷⁰ See W. Michael Reisman, *Protecting Indigenous Rights in International Adjudication*, 89 AM. J. INT’L L. 350, 352-53 (1995).

⁷¹ While international legal instruments are being drafted, including the Draft Declaration on the Rights of Indigenous Peoples, such instruments do not place indigenous populations with legal status to assert the rights that the instruments declare that indigenous peoples retain. See, e.g., Draft Declaration on the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994) (Article 19 provides that “Indigenous peoples have the right to participate in decisions that affect them. They can choose their own representatives and use their own decision-making procedures.” Article 20 allows, “Indigenous peoples have the right to participate in law and policy-making that affects them. Governments must obtain the consent of indigenous peoples before adopting these laws and policies.” And Article 36 mandates that “Governments shall respect treaties and agreements entered into with indigenous peoples.” but “Disputes should be resolved by international bodies.” However, without mandated access to international dispute mechanisms, indigenous peoples’ place at the international table remains inspirational).

⁷² See Reisman, *supra* note 71, at 354 (author provides an overview of the International Court of Justice’s examination of indigenous peoples’ claims before the court).

A. Adjudication for Violations of International Environmental Law in United States Courts

Although international environmental law may occasionally hold binding effect upon its players, it is well-established in United States courts that international law, in general, is to be ascertained and administered by the courts.⁷³ Thus a court's determination may make international law both applicable to the United States when relevant, and at times may be applied by courts like other legal principles in a similar fashion to common law.⁷⁴ In other words, while the United States might become signatory to such international agreement—and might even ratify its provisions invoking U.S. CONSTITUTION ARTICLE VI (the supremacy clause)—courts of the United States might still determine that the application of such laws may be unenforceable absent express authorization for the court to take it within its cognizance. Thus, the calculus for showing that international law applies in American law is less formulaic and more subjective or political. In most instances, a tribe seeking remedy may have little difficulty finding a violation of international treaty or custom and may in fact be able to assert a right granted under international law under an international treaty or local statute; however tribes' attempts to adjudicate claims as political entities may find an uphill battle. Most often this battle is blocked by procedural landmines of standing or failure to show the existence of a cause of action enabling courts to take jurisdiction.

Given the general constitutional principle that treaties and customary international law⁷⁵ may be sources for pressing claims

⁷³ See generally *The Paquete Habana*, 175 U.S. 677 (1900) (addressing the role of international law in United States courts).

⁷⁴ See *Garca-Mir v. Meese*, 788 F.2d 1446 (11th Cir. 1986) (finding limitations of customary international law provided that government acts *ultra vires*).

⁷⁵ E.g., *Trial Smelter*, (U.S. v. Can.), 3 R.I.A.A. 1905, 1908 (*Trial Smelter Arb.* 1938) (found that customary international law developed in case involving air quality); *Corfu Channel Case* (U.K. v. Alb.), 1949 I.C.J. 4, 35

in United States courts, United States courts must therefore consider these claims in the context of precedent and the UNITED STATES CONSTITUTION.⁷⁶ The CONSTITUTION requires that duly ratified treaties rank on par with federal statutes and customary international law may roughly be equivalent to federal common law.⁷⁷ It is unlikely that pressing international environmental legal claims in United States courts will therefore be met with great success as few courts have recognized international custom in the context of environmental law.⁷⁸ Moreover, a considerable hurdle for tribes is showing both constitutional and prudential standing as well as a cognizable private right of action under international law that a court could find enforceable.

In addition to these basic legal obstacles is that the United States is rarely party to environmental treaties. If and when the

(Apr. 9) (found also that "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States").

⁷⁶ See RESTATEMENT (THIRD) ON THE LAW OF FOREIGN RELATIONS §§ 111 cmt. d; 112(2) cmt. a (1987) (noting that the determination of international law by the U.S. Supreme Court is binding on United States courts). See also *The Paquete Habana*, 175 U.S. at 700 ("Where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations." The unwritten law of nations is "part of our law.").

⁷⁷ See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964).

⁷⁸ See, e.g., *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668 (S.D.N.Y. 1991) (plaintiffs relied on the Stockholm declaration and the Restatement (Third) of Foreign Relations § 602(2) (1987) but the court rejected these as failing to provide "universally recognized principles of international law."). See also *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999) (Plaintiffs argued that mining activities caused damage to human health and to the environment in violation of customary international law, however the circuit court held that the plaintiff had not demonstrated the existence of a rule of customary international law applicable to the alleged actions, the court even notes, "The sources of international law cited by Beanal . . . merely refer to a general sense of environmental responsibility and state abstract rights and liberties devoid of articulable or discernable standards and regulations to identify practices that constitute international environmental abuses or torts.").

United States is a party the treaty must be self-executing.⁷⁹ Thus, a determination that an environmental treaty is non-self-executing will make bringing claims on provisions of such a treaty in American court likely unsuccessful. Moreover, an environmental treaty provision will supersede a similar or equivalent earlier federal statute in conflict with it or any state legislation only if it is self-executing.⁸⁰ Furthermore, in context of customary international law a federal statute takes precedent over any customary international law rule in conflict with it.⁸¹ Thus, given that many federal statutes potentially conflict, success in U.S. courts is difficult territory.⁸² And as far as customary international law concerns environmental laws on pollution, there is lack of international consensus on the law governing state practice.⁸³

In recent years, international indigenous groups have used creative legal tactics to bring claims in United States courts. For example, in 1993, a class of 30,000 Ecuadorian citizens filed suit in an United States Court in Texas using the United States Alien Tort Claims Act⁸⁴ to challenge the environmental damage caused

⁷⁹ See RESTATEMENT (THIRD) ON THE LAW OF FOREIGN RELATIONS § 111 (1987) (non-self executing treaties require implementing legislation).

⁸⁰ See *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829) (the earliest Supreme Court utterance on this principle).

⁸¹ Note, jurisdiction, based on customary international law is the assertion of judicial authority affecting legal interests by extending extra-territorial reach to prescribe, enforce, and adjudicate against certain persons' state laws even for acts occurring outside its territory. See CARTER ET AL., *supra* note 58, at 709-11.

⁸² This is not to say that United States courts have not found customary international law grounds for granting judicial relief. See *Filartiga v. Pena-Irala*, 630 F.2d 876 (2nd Cir. 1980). It is of interesting note that since customary international law will not supersede a federal statute it does however take precedent over arguably state statutes in conflict with it. See *Banco Nacional de Cuba*, 376 U.S. at 425.

⁸³ See Aaron Schwabach, *The Sandoz Spill: The Failure of the International Law to Protect the Rhine from Pollution*, 16 ECOLOGY. L. Q. 443, 454 (1989) reprinted in PLATER ET AL., *supra* note 62, at 1185 (noting four major legal approaches to in the example provided transboundary river pollution).

⁸⁴ 28 U.S.C. § 1350.

by Texaco, Inc. as a result of its oil exploration.⁸⁵ Although unsuccessful, the use of American law by groups and individuals to press tribal environmental claims may prove to be a continuing trend.⁸⁶ As of this writing no American Indian tribes have attempted to use American courts or another nation's (i.e. Canada or Mexico) to claim violations of an international environmental treaty across international boundaries.

B. Adjudication of Claims for Violations of International Environmental Law in International Forums

It is generally true that even between two nations there is no supra-national court that automatically has jurisdiction⁸⁷ over claims for violations of international law between nation-states. The trouble of course with tribal pursuit of international environmental legal claims is that American Indian tribes are not states in the international sense of the word as it is used today in normative terms.⁸⁸ Tribes by themselves thus have little if any standing internationally as they have not and currently do not fit the international definition of a "state".⁸⁹ Thus, because of this lack of

⁸⁵ See Denise Thomasson, *Indigenous People File Suit Alleging Environment as Human Right*, The Human Rights Brief (1995) available at www.wcl.american.edu/pub/humanright/brief (last visited March 19, 2002) (discussing *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (S.D.N.Y. 2000)).

⁸⁶ See *Flores v. S. Peru Copper*, 343 F.3d 140 (2nd Cir. 2003).

⁸⁷ Even jurisdiction of the International Court of Justice at The Hague requires that both parties be nation-states and that they accept jurisdiction of the court. See U.N. CHARTER art. 26 (giving international authority for the formation of the International Court of Justice).

⁸⁸ It is worth noting that Chief Justice Marshall, in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 531 (1832), found that Indian tribes were not foreign nations only to the extent that they were not for purpose of Article III of the U.S. Constitution, C.J. Marshall did not address, nor has the Supreme Court to this day determined that American Indian tribes are no longer international actors.

⁸⁹ For instance, under the Convention on the Rights and Duties of States, a state is a "person of international law" by proving "a permanent population, a

84 BUFFALO ENVIRONMENTAL LAW JOURNAL [Vol. 11
international personhood,⁹⁰ the trend, under international law, has not been kind to tribal use of international forums to assert claims for protection of rights.⁹¹ The use of international adjudicatory forums, with the few exceptions⁹² however, evinces the trend not to recognize indigenous rights using international law asserted in United States courts or other courts worldwide. Thus, contemporary international procedural adjudication fails to recognize indigenous rights.

However, given that tribes nearly fit the definition of state in the context of international law,⁹³ and given that it is universally recognized that states have power to exploit natural resources, perhaps the future holds a potential stage for not only the assertion of rights but their actual enforcement.⁹⁴ Similar principles have been affirmed numerous times by international bodies.⁹⁵ Within

defined territory, and a capacity to enter into relations with other states". Convention on the Rights and Duties of States, art. I (Dec. 26, 1933), 49 Stat. 3097, 165 L.N.T.S. 19.

⁹⁰ A strong argument may be made that given the international definition that tribes may carry on relations with other states because they continue to maintain the political integrity and limited sovereignty inherently under the governing state (i.e. United States). However, this is not the current understanding of statehood and leaves tribes pressing claims either as private individuals or as nongovernmental organizations. Tribes, like individuals, would be required to have the states bring suits in their behalf on a *parne patria* bases or when injured individually.

⁹¹ See generally Castella, *supra* note 2.

⁹² For instance, one exception to the general trend is when states sue on behalf of tribes under treaty rights. See, e.g., Cayuga Indians Claims (U.S. v. Gr. Brit.) 73 R.I.A.A. 173 (1926) (when Great Britain on behalf of the Cayuga nation sued the United States for annuity payment under a 1794 treaty arrangement).

⁹³ Note that tribes may or may not be considered persons under international law.

⁹⁴ See RESTATEMENT (THIRD) ON THE LAW OF FOREIGN RELATIONS § 601 (1987).

⁹⁵ See ANTHONY D'AMATO, THE EVOLUTION OF INTERNATIONAL ENVIRONMENTAL LAW (2001) available at

this context these considerations—coupled with a growing understanding and acceptance of customary international law—may provide procedural standing for indigenous peoples' self-determination and the ability to press international legal claims both with countries and within international forums.

C. Tribal Options to Remedy International Environmental Claims

Boundary tribes must be involved in influencing the development of international law. The influence must include a continued push for the inclusion of tribal peoples within the provisions of international agreements and conventions.⁹⁶ For instance, the recent Convention on Biological Diversity provides mechanisms for tribes to demand access to private sector decision-making in context of environmental impacts.⁹⁷ Native communities acting as sovereign political entities must not merely be satisfied to hold rights in the international community but must be provided the legal procedure and mechanisms to assert those rights.

For instance, for tribes on the border with Canada, a further option may be found within the language of the International Joint Commission⁹⁸ between Canada and the United States to resolve border issues and "other questions or matters of differences arising between [the two nations] involving the rights, obligations, or interests or either in relation to the other or to the inhabitants of the

<http://anthonydamato.law.northwestern.edu/IELA/Intech01-2001-edited.pdf>
(last visited Oct. 6, 2003).

⁹⁶ See Draft Declaration on the Rights of Indigenous Peoples, *supra* note 72.

⁹⁷ See generally Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818; see also Charles R. McManis, *Re-Engineering Patent Law: The Challenge of New Technologies*, 2 WASH. U. J.L. & POL'Y 1 (2000).

⁹⁸ For a broad discussion of this option for border tribes See Sharon O'Brien, *The Medicine Line: A Border Dividing Tribal Sovereignty, Economies, and Families*, 53 FORDHAM L. REV. 315, 348-49 (1984).

other, along the common frontiers.”⁹⁹ The language broadly interpreted provides tribal governmental entities a starting place to put border inhabitants at the forefront of the continuing dialogue between the United States and Canada.

In addition, for tribes on both sides of the border, an arm of the North American Free Trade Agreement (NAFTA)¹⁰⁰ provides a 1994 side agreement, The North American Agreement on Environmental Cooperation.¹⁰¹ The agreement’s objectives “encourage pollution prevention” and “enhance compliance” with environmental laws and regulations” through increased “transparency and public participation.”¹⁰² And although this agreement is an agreement between state parties, the agreement provides a mechanism for a person or non-governmental organization[s] [to] make submissions to the [Commission on Environmental Cooperation] asserting [Mexico, Canada, or United States] failure to effectively enforce its environmental laws.¹⁰³

Finally, tribes might begin and continue to drum-up international consensus for treating tribes as states by the international community.¹⁰⁴ The treatment of Indigenous nations

⁹⁹ International Boundary Water Treaty Act, *supra* note 27.

¹⁰⁰ North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 605 [hereinafter NAFTA].

¹⁰¹ North American Agreement on Environmental Cooperation, Sept. 14, 1993, U.S.-Can.-Mex., 32 I.L.M. 1480. NAFTA removed most barriers to trade and investment among Canada, the United States and Mexico. In order to address environmental pressures that could be caused by increased trade and development associated with NAFTA, the parties created the North American Commission for Environmental Cooperation (CEC), the Border Environment Cooperation Commission (BECC) and the North American Development Bank (NADB). The focus of the groups is to examine local or regional concerns including tribal issues.

¹⁰² North American Agreement on Environmental Cooperation, *supra* note 102.

¹⁰³ *Id.* at arts. 2-7, (article 6 provides that parties to the agreement shall provide private access to remedies).

¹⁰⁴ See Jose Paulo Kastrup, *The Internationalization of Indigenous Rights from the Environmental and Human Rights Perspective*, 32 Tex. Int'l L. J. 97, 108 (1997).

by the international community places these peoples on par with other "international persons"¹⁰⁵ enabling tribal nations as political entities to adjudicate a great breadth of legal claims internationally.¹⁰⁶ Recognition of tribes as states would greatly increase access to international adjudicatory forums including the International Court of Justice and the Inter-American Human Rights Court.

V. CONCLUSION

It is a reality that in today's world pollution has no borders. The complex nature of regulating and providing cooperation between political-governmental entities requires continued cooperation. In the context of American Indians' sharing international boundaries, considerable overlays of jurisdiction and political interests are at stake. Border tribes have little political authority to seek remedy for violation of international environmental law and their legal status limits their ability to effectively use courts to enforce even agreed upon international environmental principles.

Tribes must continue to reinforce and examine their place in the international community as self-governing political entities with international standing. Without such authority recognized and restored to tribes to exist in the international community both politically and legally, tribes may not be able to withstand the increased call for homogenization of legal and economic parity required by a globalizing society and world. Ongoing globalization stands for a surreptitious assimilation policy that eventually will eat away at the cultural and political integrity of tribal communities, especially at the borders. Tribes must call for international recognition of their long dormant sovereign political status to protect their environment through international mechanisms which

¹⁰⁵ *See id.*

¹⁰⁶ *See id.* at 108-09 (noting that the "question of whether indigenous tribes should be considered a 'person' under international law remains unanswered in the United States.").

88 BUFFALO ENVIRONMENTAL LAW JOURNAL [Vol. 11
will sustain native voices and cultures. Tribes must be granted legal entitlements and jurisdictional authority to assert claims in any court, including international forums. Procedural nuance should not inhibit native peoples' ability to assert their rightful sovereign status at the international table.

There is call and need for continued optimism. International law is evolving and is a process that has historically been dialectical.¹⁰⁷ Recent global interest in indigenous peoples' rights led to the United Nations declaring this the decade of indigenous people (1995-2004).¹⁰⁸ And border tribes' assertion of claims at the international level potentially strengthens international cooperation and attempts to confront and resolve problems including environmental destruction. Continued interest at the borders provides future benefit for all native people who are so often overlooked and left behind.

¹⁰⁷ See HIGGINS, *supra* note 59.

¹⁰⁸ See International Decade of the World's Indigenous People, G.A. Res. 163, U.N. GAOR, 48th Sess., Supp. No. 49, at 281, U.N. Doc. A/48/163 (1993).